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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

DONALD L. ATKINS,

Petitioner,

v.

SCHMUTZ MANUFACTURING CO., INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Donald L. Atkins prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on February 16, 1967.

CITATIONS TO OPINIONS BELOW

The opinion and order of the District Court is unreported (R* 9a) and is printed in Appendix "B" hereto, *infra* App.

*Reference to pages of the record certified to this Court by the Clerk, United States Court of Appeals for the Sixth Circuit, will be designated by "R."

2. The opinion of the Circuit Court of Appeals, also printed in Appendix "B" hereto, *infra* App. 5, is reported in 372 F.2d 762.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 16, 1967. R. 16; Appendix "B", *infra* App. 9. However, an order extending time to file petition for a writ of certiorari until July 14, 1967, was entered in this Court by the Honorable Potter Stewart, Associate Justice, on May 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether a federal court, having consistently held that a statute of the forum state required the application of the longer limitation period of the state in which the cause of action arose, may retroactively apply a decision rendered by the highest court of the forum state subsequent to the bringing of this action requiring the application of the forum state's shorter period of limitations where the effect is to bar petitioner's action for personal injuries without due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are Amendments V and XIV to the Constitution of the United States of America. In addition, the following statutory provisions are involved: KRS 413.140 and KRS 413.320 of the Kentucky Revised Statutes and Section 8-24 of the Code of Virginia (1950). The foregoing are printed in Appendix "A", *infra* App. 1.

STATEMENT

1. The Facts.

Petitioner, Donald L. Atkins, was critically injured in Virginia on June 22, 1961, by a machine manufactured by the Respondent, Schmutz Manufacturing Co., Inc., which had been shipped to Virginia for use by Petitioner's employer. Schmutz Manufacturing Co., Inc. was chartered under the laws of Kentucky, was not doing business in Virginia, and was, therefore, not amenable to service of process in Virginia.

2. The Situation Leading to Petitioner's Being Denied Due Process of Law.

The Virginia Statute of Limitations for personal injury actions is two years. Code of Virginia (1950), § 8.24, *infra* App. 1. The period of limitations for personal injury actions arising in Kentucky is one year. KRS 413.140, *infra* App. 1. Prior to the year 1942, Carroll's Kentucky Statutes, § 2542, provided as follows:

> "When a cause of action has arisen in another state or country between residents of such state or country or between them and residents of another state or country, and by the laws of the state or country where the cause of the action accrued an action cannot be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this state."

This statutory provision has been interpreted by the Kentucky Court of Appeals in a long line of decisions as holding that where the cause of action is not barred in the state where the action originated, it would not be barred in Kentucky. *Gibson* v. *Womack,* 291 S.W. 1021 (Ky. 1927); *Smith* v. *Baltimore & Ohio Ry. Co.,* 162 S.W. 564

(Ky. 1914); *John Shillito Co.* v. *Richardson*, 42 S.W. 847 (Ky. 1897); and, *Labatt* v. *Smith*, 83 Ky. 599 (1886). In 1942, Carroll's Kentucky Statutes, § 2542, was amended and re-enacted as KRS 413.320, as follows:

> "When a cause of action has arisen in another state or country, and by the laws of the state or country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period."

Thereafter and until its decision in *Seat* v. *Eastern Greyhound Lines, Inc.*, 389 S.W. 2d 908 (Ky. 1965), the Court of Appeals of Kentucky had not construed KRS 413.320.

In the exercise of their diversity jurisdiction, the federal courts have been called upon to interpret KRS 413.320 on a number of occasions since its enactment in 1942. In a series of well-considered decisions, the United States Court of Appeals for the Sixth Circuit had determined that where the period of limitation of the state in which a personal injury action arose was longer than that of Kentucky, the longer statute of limitations would apply to a diversity action brought in a federal court sitting in Kentucky. *Collins* v. *Clayton & Lambert Manufacturing Co.*, 299 F. 2d 362 (6th Cir. 1962); *Koeppe* v. *Great Atlantic & Pacific Tea Co.*, 250 F. 2d 270 (6th Cir. 1957); and *Burton* v. *Miller*, 185 F. 2d 817 (6th Cir. 1950).

In so concluding, the Court of Appeals was particularly influenced by the very slight difference in the language of the two statutes. Circuit Judge Martin, in *Burton* v. *Miller*, 185 F. 2d 817, 819 (1950), observed in reviewing these two statutes that:

> "It is reasonable to presume that, in thus amending section 2542, the Kentucky Legislature was aware of the interpretation which had been placed upon the old statute in the opinions of the Court of Appeals of Kentucky. It would appear that the real purpose of the Kentucky Legislature in amending section 2542 was to place residents of Kentucky on the same basis with non-residents of that state with respect to causes of action arising in other states, or countries. There would seem to be no other differentiation between the old and the revised statute than the elimination of the requirements as to parties.
>
> "Inasmuch as we have been cited to no opinion of the Court of Appeals of Kentucky construing the 1942 revised statute and because of the compelling similarity of the two enactments, we are constrained to follow the interpretation of section 2542 enunciated in the Kentucky cases which have been discussed."

On February 9, 1962, more than seven months after the petitioner's cause of action arose, the Court of Appeals for the Sixth Circuit rendered its decision in *Collins* v. *Clayton & Lambert Manufacturing Co.*, 299 F 2d 362. There, the cause of action accrued in the State of Indiana and the case was tried in a federal district court in Kentucky. The question was raised, "Did the one year Statute of Limitations of Kentucky, KRS 413.140, govern or was the two year Statute of Limitations of Indiana made applicable by Kentucky law?" The Court of Appeals definitively held:

> "This seems to be a short horse. This Court has twice considered this question and ruled that under Kentucky law the time provided by the statute of limitations of another state, if longer, is applicable. This is admitted by appellant who seeks to have this Court reverse these decisions. We are not persuaded

> that they are wrong and abide by them." (299 F.2d at 364)

As Schmutz Manufacturing Co., Inc. was not amenable to suit in Virginia, the only place that respondent could be sued on this cause of action was in Kentucky. Relying upon the consistent line of procedural decisions rendered by the federal courts in Kentucky, petitioner filed this action in a Kentucky federal court more than one year but less than two years after the cause of action arose. Through discovery, the parties actively pursued the various factual issues involved in the case. At great expense to both parties, depositions were taken and technical experts were retained. See Appendix "C", *infra* App. 10-App. 13. The action remained pending and was ready to be set for trial.

Then, on April 30, 1965, in *Seat* v. *Eastern Greyhound Lines, Inc.*, 389 S.W. 2d 908, the Court of Appeals of Kentucky refused to follow the long established and consistent holdings of the Court of Appeals for the Sixth Circuit that "if a cause of action which arose in another state is not barred by the law of that state, it is not barred in an action in Kentucky." (389 S.W. 2d at 909) Acknowledging that its decisions previous to amendment of the statute in 1942 required the statute of limitations of another state, if longer, to be applied, the Kentucky Court stated that the assumption by the federal courts that Kentucky would follow the prevailing rule when KRS 413.320 came up for consideration was "well founded." (389 S.W. 2d at 909). Expressly overruling its prior decisions in the *Smith, Labatt, John Shillito* and *Gibson* cases, *supra,* pp. 3-4, the Kentucky Court held that:

> "If the statute of limitations in the foreign state is for a longer period of time than the statute provides in

this state, then the law of Kentucky will prevail." (389 S.W. 2d at 910)

Following its drastic and totally unexpected decision in *Seat,* the Court of Appeals of Kentucky subsequently held on June 18, 1965, in *Wethington* v. *Griggs,* 392 S.W.2d 56, 57, that its holding in the *Seat* case would be applied retroactively.

3. Proceedings Below.

This action was instituted in the United States District Court for the Western District of Kentucky, at Louisville, on June 19, 1963. The jurisdiction of the District Court was invoked because of the diversity of citizenship of the parties. 28 U.S.C., § 1332 (a). Relying on the *Seat* decision, defendant moved for summary judgment on June 15, 1965, on the ground that the action was barred by the statute of limitations, having been brought more than one year after the injury occurred. Defendant's motion was sustained and a judgment was entered by the District Court dismissing the action with prejudice on July 7, 1965. R. 12a; *infra* App. 5. On appeal to the United States Court of Appeals for the Sixth Circuit, this judgment was affirmed by Order dated February 16, 1967. R. 16; *infra* App. 9.

4. Subsequent Proceedings in Another Action.

Having been barred from bringing his action in Kentucky, petitioner filed another action in the United States District Court for the Western District of Virginia, Danville Division, on March 13, 1967. Service of process upon respondent was made pursuant to Virginia's new "long arm statute", enacted March 31, 1964. Holding that the pendency of this action in Kentucky did not suspend the running of the Virginia statute of limitations, and that,

therefore, the limitations period had expired, the District Judge granted defendant's motion for summary judgment and dismissed the action. The Opinion of the District Judge, rendered May 26, 1967, is printed as Appendix "D", *infra* App. 14-App. 20. The Virginia case is presently on appeal to the United States Court of Appeals for the Fourth Circuit and has been assigned Docket No. 11,566.

REASONS FOR GRANTING THE WRIT

The decision of the court below applying *Seat* v. *Eastern Greyhound Lines, Inc.*, 389 S.W. 2d 908 (Ky. 1965), retroactively so as to bar petitioner from any right of action for his personal injuries deprived him of due process of law in its primary sense of an opportunity to be heard in defense of a substantive right, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America. *Infra* App. 1.

In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930), the plaintiff brought suit in a Missouri state court to enjoin an alleged discriminatory collection of taxes. In a long line of decisions, the Missouri Supreme Court had repeatedly held that a suit in equity was the only remedy open to a taxpayer wishing to contest the validity of an assessment. In the *Laclede* case, the Missouri Court had further held that the State Tax Commission had no power to review and grant relief for an improper assessment of tax, stating "it was 'preposterous' and 'unthinkable' that the statute conferred such power on the commission ...." (281 U.S. at 676)

The Supreme Court of Missouri dismissed the bill, without hearing on the substantive question, on the ground that the statute gave to the taxpayer an adequate remedy of appeal to the State Tax Commission and that the period

of limitations for appeal to the Tax Commission had run. On appeal to the United States Supreme Court, the late Mr. Justice Brandeis, speaking for a unanimous court, held that the retroactive application of the overruling decision, when taken in conjunction with the statute of limitations, had the effect of denying the taxpayer " 'due process of law'—using the term in its primary sense of an opportunity to be heard and to defend its substantive right" to be taxed on a nondiscriminatory basis. In view of the *Laclede* decision, an appeal to the tax commission would have been futile; and, when *Laclede* was overruled in this case, such appeal was barred by the statute of limitations. Thus, the decision of the Missouri Supreme Court giving retroactive effect to the holding overruling *Laclede,* though not in itself unconstitutional, became so when, in light of the expired period of limitations for an appeal to the tax commission, its effect was to preclude the taxpayer from ever being heard on its claim.

More recently, in *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964), this Court enlarged the principle enunciated by *Brinkerhoff-Faris.* There, petitioners had been convicted of criminal trespass on the premises of a drug store upon the authority of a statute prohibiting "entry upon the lands of another . . . after notice . . . prohibiting such entry." Such notice was not given until *after* petitioners had taken seats in a booth. In upholding their convictions, the South Caroline Supreme Court retroactively applied a decision in a companion case (*City of Charleston* v. *Mitchell*) expanding the limiting words of the statute to include "the act of remaining on the premises of another after receiving notice to leave." (378 U.S. at 350) The United States Supreme Court, speaking through Mr. Justice Brennan, reversed the convictions, stating:

"The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. See, e. g., *Wright* v. *Georgia,* 373 U.S. 284, 291, 83 S.Ct. 1240, 1245, 10 L.Ed.2d 349; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 456-458, 78 S.Ct. 1163, 1168-1169, 2 L. Ed.2d 1488; *Barr* v. *City of Columbia,* 378 U.S. 146, 84 S.Ct. 1734. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him. In both situations, 'a federal right turns upon the status of state law as of a given moment in the past—or, more exactly, the appearance to the individual of the status of state law as of that moment * * *.' 109 U.Pa.L.Rev., supra, at 74, n. 34. *When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.' Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. Applicable to either situation is this Court's statement in *Brinkerhoff-Faris,* supra, that '[i]f the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would

be obvious,' and 'The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid * * * state statute.' Id., 281 U.S. at 679-680, 50 S.Ct. at 454.

Applying those principles to this case, we agree with petitioners that § 16-386 of the South Carolina Code did not give them fair warning, at the time of their conduct in Eckerd's Drug Store in 1960, that the act for which they now stand convicted was rendered criminal by the statute By its terms, the statute prohibited only 'entry upon the lands of another * * * after notice from the owner * * * prohibiting such entry * * *.' There was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave. Petitioners did not violate the statute as it was written; they received no notice before entering either the drugstore or the restaurant department. Indeed, they knew they would not receive any such notice, before entering the store, for they were invited to purchase everything except food there. So far as the words of the statute were concerned, petitioners were given not only no 'fair warning,' but no warning whatever, that their conduct in Eckerd's Drug Store would violate the statute.

* * *

The pre-existing law gave petitioners *no warning whatever* that this criminal statute would be construed, despite its clear language and consistant judicial interpretation to the contrary, as incorporating a doctrine found only in civil trespass cases.

The South Carolina Supreme Court in *Mitchell* also cited North Carolina decisions in support of its construction of the statute. It would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different

> from what its words said. No such situation is presented here. * * *.
>
> We think it clear that the South Carolina Supreme Court, in applying a new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed them by the Due Process Clause." (378 U.S. at 354, 355, 359, 360, 362) [Emphasis Supplied]

Under federal law, a "cause of action is to be tested as of the time of the filing of the complaint. . . ." *Knapp-Monarch Co.* v. *Casco Products Co.,* 342 F. 2d 622, 627 (7th Cir. 1965) Had KRS 413.320 been enacted after this action was brought; rather than in 1942, it could not have constitutionally been applied retroactively to bar the suit. *Sohn* v. *Waterson,* 84 U.S. 596 (1873). If there had been no construction of KRS 413.320 since its enactment in 1942, petitioner might fairly have been charged with the risk that the interpretation given its predecessor, Section 2542, might not be followed. But, the Kentucky Court of Appeals and Kentucky Legislature had not given the slightest hint that the rule would be changed. And, more important, the Court of Appeals for the Sixth Circuit had repeatedly held that the longer limitations period was applicable. Having reasonably relied on the existing judicial rule, any change in that rule should be given prospective effect only where to apply it retroactively would completely bar petitioner's substantive claim. *Safarik* v. *Udall,* 304 F. 2d 944 (D.C. Cir. 1962)

By applying *Seat* retroactively so as to give your petitioner "no warning whatever," the federal courts below have abdicated their primary responsibility to afford litigants that due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK C. MALONEY, III
2nd Floor Massey Building
4th & Main Streets
Richmond, Virginia 23219
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Frank C. Maloney, III, Counsel for Donald L. Atkins, petitioner, in the matter styled "Donald L. Atkins v. Schmutz Manufacturing Co., Inc.", do hereby certify that I served a true copy of the foregoing petition (with Appendix) for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit on the respondent on July 13, 1967, by depositing same in a United States mailbox, with first class air mail postage prepaid, addressed to John P. Sandidge, Esq., Woodward, Hobson & Fulton, Suite 1805-26 Kentucky Home Life Building, Louisville, Kentucky 40202, Counsel of record for the respondent.

FRANK C. MALONEY, III

APPENDIX "A"

Text of Constitutional Amendments and Statutes Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CODE OF VIRGINIA (1950)

§ 8-24. *Of actions not before specified.*—Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. * * * The amendment extending the period within which an action for personal injuries may be brought under this section to two years shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four.

KENTUCKY REVISED STATUTES

KRS 413.140—*Actions to be brought within one year.*

(1) The following actions shall be commenced within one year after the cause of action accrued:

(a) An action for any injury to the person of the plaintiff, or of his wife, child, ward, apprentice or servant.

* * *

KRS 413.320—*Cause of action barred here if barred where it accrued.*

When a cause of action has arisen in another state or country, and by the laws of this state or country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period.

APPENDIX "B"

Opinions and Judgments Below

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

This case is before the Court on the defendant's motion for summary judgment and for a judgment on the pleadings on the stated grounds that the accident out of which the action arises occurred June 22, 1961, lacking three days being two years prior to the filing of the action in this Court on June 19, 1963, and is barred by limitations.

The defendant interposed in its answer a plea of Kentucky's one-year statute of limitations established by KRS 413.140. The plaintiff filed a reply relying upon the Virginia statute of limitations of two years.

KRS 413.320 provides:

> "When a cause of action has arisen in another state or country, and by the laws of the state or country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period."

Prior to its decision in *Seat* v. *Eastern Greyhound Lines, Inc., Ky.,* 389 S.W. 2d 908, on April 30, 1965, the Kentucky Court of Appeals held in several cases that if a cause of action which arose in another state is not barred by the laws of that state it is not barred in Kentucky. The decision in the Seat case is clear and succinct, and the Court said:

> "If the statute of limitations in the foreign state is for a longer period of time than the statute provides in this state, then the law of Kentucky will prevail."

Previous opinions of the Kentucky Court of Appeals holding to the contrary were specifically overruled.

Under the rule announced in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), this Court has held that the construction placed upon a state statute by the highest court of the state was controlling in a federal court in an action where jurisdiction was based solely upon diversity of citizenship.

At page 78 of its opinion in the Erie Railroad case, supra, the Supreme Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

In the case of *Guaranty Trust Co.* v. *York,* 326 U.S. pp. 110-111 (1945), the Supreme Court said:

> "... even before *Erie R. Co.* v. *Tompkins,* federal courts relied on statutes of limitations of the States in which they sat. In suits at law State limitations statutes were held to be 'rules of decision' within § 34 of the Judiciary Act of 1789 and as such applied in 'trials at common law.'"

The case of *Swift* v. *Tyson,* 41 U.S. 1, overruled in part by the *Erie Railroad* case, upheld the rule of the Judiciary Act of 1789 that the construction of a statute by a court of last resort of a state was binding upon a federal court in actions where jurisdiction was founded upon diversity of citizenship.

IT IS ORDERED that defendant's motion for summary judgment be and the same hereby is sustained. A judgment will be entered dismissing this action with prejudice.

June 30, 1965

/s/ ROY M. SHELBOURNE
ROY M SHELBOURNE
United States Senior District Judge
Sitting by Designation

JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

This action came on for hearing before the Court, Honorable Roy M Shelbourne, Senior, United States District Judge, Sitting by Designation, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff, Donald L. Atkins, take nothing, that the action be dismissed, and that the defendant, Schmutz Manufacturing Company, Incor-

porated, recover of the plaintiff, Donald L. Atkins, its costs of action.

Dated at Louisville, Kentucky, this 7th day of July, 1965.

/s/ MARTIN R. GLENN
Clerk of Court

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Before: WEICK, Chief Judge, and PHILLIPS and PECK, Circuit Judges.

PHILLIPS, Circuit Judge. This case presents the issue of whether the one-year Kentucky statute of limitations or the Virginia two-year statute applies to a complaint filed in a Kentucky federal court when the tort occurred in Virginia.

Appellant was injured June 22, 1961, while working in Virginia, by a machine manufactured by appellee which was shipped to Virginia. Appellee was not amenable to service of process in Virginia. The complaint was filed in Kentucky June 19, 1963, more than one year after appellant's injury and less than two years after the accident out of which the action arises.

Under three previous decisions of this court, the Virginia two-year statute of limitation would govern and the action would not be barred by the Kentucky one-year statute. *Collins* v. *Clayton & Lambert Manufacturing Co.*, 299 F. 2d 362 (C.A. 6); *Koeppe* v. *Great Atlantic & Pacific Tea Co.*, 250 F. 2d 270 (C.A. 6); *Burton* v. *Miller*, 185 F. 2d 817 (C.A. 6). The decisions of this court were based upon the case law of Kentucky, which we construed to be controlling. *Gibson* v. *Womack*, 218 Ky. 626, 291 S.W. 1021, 51 A.L.R. 773; *Smith* v. *Baltimore & Ohio Railway Co*, 157 Ky 113, 162 S.W. 564; *Shillito* v. *Richardson*, 102 Ky. 51, 42 S.W. 847; *Labatt* v. *Smith*, 83 Ky. 599.

The foregoing decisions of this court and the Kentucky Court of Appeals were in effect at the time the complaint was filed in the present case. Appellant asserts that he relied upon these decisions in filing his complaint three days before the Virginia two-year statute of limitations would have run.

On April 30, 1965, the Kentucky Court of Appeals announced its decision in *Seat* v. *Eastern Greyhound Lines,* 389 S.W. 2d 908. In that case the cause of action arose in Illinois, where the controlling statute of limitations would have been two years. The Kentucky court held that the action was barred by the Kentucky one-year statute, saying:

> "If the statute of limitations in the foreign state is for a longer period of time than the statute provides in this state, then the law of Kentucky will prevail. If, on the other hand, the period of time provided by the statute in the foreign state is shorter than that provided in Kentucky, then KRS 413.320 applies and the law of the foreign jurisdiction shall prevail. Insofar as the Smith, Labatt, John Shillito and Gibson cases (supra) are in conflict herewith, they are expressly overruled.
>
> "In this case KRS 413.320 does not apply. The Illinois statute provides for a two year period. In Kentucky the limit is one year. Applying the law of the forum, the action was brought too late and was properly dismissed." 389 S.W. 2d at 910.

This decision of the Kentucky court was based upon its interpretation of KRS 413.320. This statute, as amended in 1942, provides:

> "When a cause of action has arisen in another state or country, and by the laws of this state or country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period."

Prior to 1942, Section 2542 of the Kentucky statutes then existing provided as follows:

> "When a cause of action has arisen in another state or country between residents of such state or country or between them and residents of another state or country, and by the laws of the state or country where the cause of the action accrued an action cannot be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this state."

The four Kentucky cases above cited, all of which were overruled by *Seat* v. *Eastern Greyhound Lines, supra,* were decided prior to the 1942 amendment.

Senior District Judge Roy M. Shelbourne sustained defendant's motion for summary judgment and dismissed the action on the ground that it is barred by the one-year statute of limitations of Kentucky, relying upon *Seat* v. *Eastern Greyhound Lines, supra.*

Appellant urges that *Seat* v. *Eastern Greyhound Lines* should be applied only prospectively. Unfortunately for appellant, the Kentucky Court of Appeals applied this decision retroactively in *Wethington* v. *Griggs,* 392 S.W. 2d 56. The *Wethington* case arose out of an automobile accident which occurred in Ohio on March 15, 1962. Ohio had a two-year statute of limitations. The action was filed in Kentucky more than one year after the date of the accident, but before the Ohio two-year statute would have run. Applying the law of the forum, the Kentucky court held that the action was brought too late and was barred by the one-year statute of limitations.

In diversity cases the law of the State in which a federal court sits must be followed with respect to the statute of limitations, *Guaranty Trust Co.* v. *York,* 326 U.S. 99, re-

hearing denied, 326 U.S. 806, and conflicts of laws, *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487. Speaking for the Court in *Guaranty Trust Co.* v. *York*, Mr Justice Frankfurter said:

> "*Erie R. Co.* v. *Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure,' we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, *Cities Service Co.* v. *Dunlap*, 308 U.S. 208, as to conflict of laws, *Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487, as to contributory negligence, *Palmer* v. *Hoffman*, 318 U.S. 109, 117. And see *Sampson* v. *Channell*, 110 F. 2d 754, *Erie R. Co.* v. *Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts." 326 U.S. at 109, 110.

If the complaint in the present case had been filed in a State court of Kentucky more than one year after the cause of action arose, it would have been barred by the Kentucky one-year statute of limitations, under the 1942 revision of KRS 413.320 as interpreted by the Kentucky Court of Ap-

peals, *Wethington* v. *Griggs, supra,* 392 S.W. 2d 56. The same result must be reached by this court in a diversity case arising in Kentucky. *Woods* v. *Interstate Realty Co.,* 337 U.S. 535; *Angel* v. *Bullington,* 330 U.S. 183.

Even though the equities of this case strongly favor appellant, this court has no choice except to apply the *Erie Railroad* doctrine. *Wells* v. *Simonds Abrasive Co.,* 345 U.S. 514.

Affirmed.

Decided February 16, 1967.

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEAL from the United States District Court for the Western District of Kentucky .

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS
Clerk

Filed February 16, 1967.

APPENDIX "C"

Docket Entries Upon Record of the United States District Court for the Western District of Kentucky at Louisville

Date 1963	*Filings—Proceedings*
6–19	Complaint filed at Paducah, Kentucky. Summons issued at Paducah and mailed to Marshal at Louisville, with two copies of complaint.
6/25	Notice of Dismissal as to defendant Liberty Mutual Insurance Company filed by plaintiff.
7–1	Summons for (Schmutz Mfg. Co.) on JULIUS SCHMUTZ returned as executed on 6-26-63.
7–8	Summons as to Liberty Mutual Ins. Co. returned unexecuted at request of plaintiff's atty. See copy of letter attached.
7–10	Motion for more definite statement and Starement in support of motion for more definite statement filed by James W. Hendricks.
7–11	Motion to require plaintiff to execute bond for costs, Motion to require plaintiff to allege in his complaint the number of the section and quote the section of the police of insurance issued by this def. to U.S. Plywood Co. on which cause of action against this def. is asserted and Memorandum filed by Robert P. Hobson.
7/30	ORDER dated 7/30/63 that the motion of the defendant Schmutz is overruled; (2) that the de-

fendant Schmutz shall not be required to file answer until the deposition referred to shall have been taken and filed (depo. of plff) Copies to attorneys Guthrie, Allen, Williams, Hendricks and Hobson 7/30.

8/6 ORDER dated 8/6/63 that by agreement of the parties the two motions filed herein by Liberty Mutual Insurance Company are hereby withdrawn and may be stricken from the record. Copies to Chas. A. Williams and Robert P. Hobson.

9/6 ORDER dated 9/6/63 setting PTConf 9/16/63 at 11:45 a.m. Copies to Attorneys Williams, Allen, Guthrie, Hendricks and Hobson.

9/13 ORDER dated 9/13/63 removing from pre-trial calendar of 9/16/63. Copies to Attorneys Williams, Allen, Guthrie, Hendricks and Hobson—9/13/63.

10–3 Order signed by Judge Shelbourne dated 10-3-63 that on motion of def., the name of James W. Hendricks is stricken from the record as atty for Schmutz Mfg. Co., and in lieu thereof the name of Robert P. Hobson is inserted. Copies mailed to Chas. Williams, David Guthrie, George E. Allen, Jr., Robert P. Hobson and Jas W. Hendricks.

11/9 Answer filed.

1964

2/12 ORDER dated 2/12/64 setting PTConf 2/24/64 at 11 a.m. Copies 2/12/64 to Attorneys Williams, Allen, Guthrie and Hobson.

2/26 ORDER dated 2/25/64 continuing PTConf to 2/27/64. Copies 2/26/64 to Attorneys Williams, Allen, Guthrie and Hobson.

3–10 Deposition of Julius Schmutz, taken by plaintiff, filed by Steve Newman, Notary, with exhibits.

3–10 Deposition of Donald L. Atkins, taken by defendant, filed by Mary B. Kelly, Notary.

8/21 Interrogatory filed by Defendant.

8/27 ORDER dated 8/27/64 setting PTConf 9/8/64 at 2 p.m. Copies to Attorneys Allen, Guthrie, Williams and Hobson.

9/3 Answer to Interrogatory filed by Plaintiff.

9/10 ORDER dated 9/10/64 (PTConf held 9/10/64) Court directed counsel for plaintiff to reply to defense pleading statute of limitations in answer; by agreement not placed on trial docket. Copies to Attorneys Williams, Guthrie, Allen and Hobson.

9–19 Reply—filed by Plaintiff.

10/12 Deposition of DR. ROBERT E. MUSGRAVE filed with depositions of DR. W. LLOYD EASTLACK, FRANKLIN SMITH and NEAL BEATTY.

1965

5/17 Request for Admissions led by Plaintiff.

5/18 Defendant's Objections to Plaintiff's Request For Admissions—filed by Robt. P. Hobson, atty.

5/19 ORDER dated 5/19/65 setting hearing on defendant's objections to plaintiff's request for admissions on 5/21/65 at 2 p.m. Copies to Attorneys Williams, Guthrie, Allen and Hobson,

5/20 Response to Defendant's Objections to Plaintiff's Request for Admissions filed.

5/25 Motion for Court to reconsider defendant's objections to Plff Request for Admissions.

6/15 Motion for Summary Judgment and Judgement on the pleadings filed by Defendant.

6/26 Memorandum in response to Defendant's motion for Summary Judgment filed by Plff.

6/30 ORDER dated 6/30/65 that defendant's motion for summary judgment is sustained; judgment will be entered dismissing this action with prejudice. Copies to Attorneys Williams, Guthrie, Allen and Hobson.

7–7 Judgment entered by Clerk on 7-7-65—plaintiff, Donald L. Atkins, to take nothing, that action be dismissed and that the defendant, Schmutz Mfg. Co., Inc. recover of plaintiff its costs of action. Copies to R. P. Hobson, Charles A. Williams, George E. Allen and David F. Guthrie, Jr. and Judge Shelbourne.

8–4 Notice of appeal by plaintiff to U. S. Court of Appeals for 6th Circuit—filed
(Copy mailed to Robert P. Hobson, attorney)

8–10 Bond for costs on appeal in amount of $250.00 executed by Donald L. Atkins, and by Chas. A. Williams as surety,—filed

APPENDIX "D"

Opinion and Judgment of the United States District Court for the Western District of Virginia, Danville Division

DONALD T. ATKINS, Plaintiff

v.

SCHMUTZ MANUFACTURING COMPANY, INC., Defendant

Civil Action Number 67-C-13-D

Opinion and Judgment

By: Ted Dalton, U. S. District Judge

This personal injury suit is brought to the court upon a jurisdictional basis of diversity of citizenship, and amount in controversy in excess of $10,000. The clearest way to present the issue before this court, is to begin with an examination of the facts.

Plaintiff, Donald T. Atkins, was injured on June 22, 1961, at South Boston, Virginia when he was caught in a machine manufactured and sold by defendant, Schmutz Manufacturing Company, Inc. The injury necessitated amputation of both of plaintiff's feet and the plaintiff spent a long period of time in various hospitals and rehabilitation centers. Plaintiff alleges that defendant was negligent in the design and construction of the machine which severely and permanently injured him, and plaintiff prays for judgment in the sum of $470,000.

At the time of the injury, defendant had, and apparently still has, its only place of business in Louisville, Kentucky. All of defendant's sales are made from Kentucky, and defendant employs no salesmen in Virginia. The events in this

case took place before the Virginia "long arm statute" was enacted in 1964, thus plaintiff concluded that the defendant would not be subject to suit in Virginia. Plaintiff brought suit against the defendant in the U. S. District Court for the Western District of Kentucky on June 19, 1963. The suit in Kentucky was brought more than one, but less than two years after the date of the injury. The statute of limitations applicable to plaintiff's cause of action is two years in Virginia (§8-24 Code of Virginia) and one year in Kentucky (KRS §413.140). However, at the time plaintiff brought suit in Kentucky, prior cases held that the longer statute of limitations would govern in a suit filed in Kentucky, but based on a cause of action arising in a state whose statute of limitations was longer than the one year Kentucky statute of limitations. *Collins* v. *Clayton & Lambert Mfg. Co.*, 299 F. 2d 362 (6th Cir. 1962). Thus, when plaintiff brought suit in Kentucky, the existing rule was to apply the longer statute of limitations, and plaintiff expected the Virginia two year statute of limitations to be applicable in his case.

While plaintiff's suit was pending in the U. S. District Court for the Western District of Kentucky, the Kentucky Court of Appeals held that if the statute of limitations in the foreign state is for a longer period of time than the one year Kentucky statute of limitations, the law of Kentucky would prevail. *Seat* v. *Eastern Greyhound Lines, Inc.*, 389 S.W. 2d 908 (1965). Thereafter, defendant filed a motion for summary judgment, asserting the plea of the Kentucky statute of limitations. The U. S. District Court for the Western District of Kentucky stated that in diversity cases, it was bound to apply the state law as interpreted by the highest court of the state, and sustained defendant's motion for summary judgment. The judgment was affirmed by the U. S. Court of Appeals for the Sixth Circuit, and plaintiff

is appealing the decision to the United States Supreme Court.

Plaintiff now brings his suit in this court on the jurisdictional basis of diversity of citizenship and amount in controversy in excess of $10,000. This suit is brought more than two years after the injury occurred, and defendant filed a motion for summary judgment, asserting the plea that the Virginia two year statute of limitations bars plaintiff's suit. Plaintiff answers that the running of the Virginia statute of limitations was tolled while his suit was pending in Kentucky. The merits of the proceedings in Kentucky are not before this court, and the sole issue of this case is whether plaintiff's abortive Kentucky action tolled the running of the Virginia statute of limitations.

Plaintiff cites *Burnett* v. *New York Central RR,* 380 U. S. 424 (1965), to support his contention that the Kentucky suit tolled the running of the Virginia statute of limitations. In *Burnett,* the United States Supreme Court held that the running of the F.E.L.A. statute of limitations was suspended when the plaintiff filed timely suit, even though the suit was later dismissed for improper venue. *Burnett* is not controlling in this case, because it was concerned solely with interpretation of a federal statute. Even though the F.E.L.A. provision and the Virginia statute be worded similarly, the construction placed on the federal statute is not necessarily the construction that must be placed on the state statute. This case is founded on diversity of citizenship, not federal statute, and the construction placed upon a state statute by the highest court of the state is controlling. Whether Virginia's statute of limitations be labeled substance or procedure, it clearly affects the outcome of this case and must be applied. *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945).

The applicable statute of limitations covering plaintiff's cause of action is §8-24 Code of Virginia (1950) which states: "Every action for personal injuries shall be brought within two years after the right to bring the same shall have accrued." The right to bring suit accrues at the time of injury. *Hawks* v. *DeHart,* 206 Va. 810, 146 S.E. 2d 187 (1966). Those instances in which the statute of limitations is suspended are controlled by §8-34 Code of Virginia (1950). §8-34 is identical to older §5826 Code of Virginia (1919), which was construed by the Supreme Court of Appeals of Virginia in *Jones* v. *Morris Plan Bank,* 170 Va. 88, 195 S.E. 525 (1938).

The plaintiff in *Morris Plan Bank* had filed a timely suit which was later dismissed for lack of proper venue. When the plaintiff later brought suit in the proper forum, the defendant pleaded the statute of limitations as a bar. Plaintiff in *Morris Plan Bank* answered, as the plaintiff here does, that the Virginia statute of limitations was suspended while his suit was pending in another forum. The Supreme Court of Appeals of Virginia rejected the plaintiff's contention, and held that the statute of limitations had run.

> An analysis of our statute (section 5826) shows that in only four instances is there a suspension of the statute of limitations by reason of the pendency of a former suit brought in due time. These are (1) Where such suit abates "by return of no inhabitant," that is, where the writ is not served for that reason; (2) where the suit abates by reason of the "death or marriage" of a party! (3) where, after the plaintiff has obtained a judgment or decree in his favor, it is "arrested or reversed upon a ground which does not preclude a new action or suit for the same cause;" and (4) where "there be occasion to bring a new action or suit by reason of the loss or destruction of any of the papers or records in a former suit or action which was in due time."

None of these provisions applies to the plaintiff's case. There is no saving provision where a suit, such as that of the plaintiff here, was brought in the wrong forum or was dismissed otherwise than upon the merits. *Jones* v. *Morris Plan Bank,* Supra.

Plaintiff contends that *Morris Plan Bank* is not controlling here because it was based on a legislative intent to insure that the statute of limitations would not toll when a plaintiff sues in the "wrong" forum. Thus plaintiff here contends that the rule in *Morris Plan Bank* should not apply to him because he did not sue in the "wrong" forum. Rather, he sued in a proper forum, which became improper only after a retroactive change in the applicable law. Even assuming that *Morris Plan Bank* should not be controlling here, the plaintiff has still failed to show a ground which would toll the running of the statute of limitations. There are no exceptions to a statute of limitations except those made by the statute itself. *Johnson* v. *Merritt,* 125 Va. 162, 99 S.E. 785, 789 (1919); *Clark* v. *Nave's Creditors,* 116 Va. 838, 83 S.E. 547 (1914); *Bickle* v. *Chrisman's Adm'x.,* 76 Va. 678 (1882). "In the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case, the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice to him. . . ." *Norwood* v. *Buffey,* 196 Va. 1051, 86 S.E. 2d 809 (1955). Plaintiff has not brought himself within any of the four exceptions set out in § 8-34 Code of Virginia (1950). We do not agree with plaintiff that *Brunswick Land Corp.* v. *Perkinson,* 153 Va. 603, 151 S.E. 138 (1930), is helpful argument for plaintiff's position. The case held that the pending of the first suit did not toll the statute of limitations with regard to the second suit. The provision of § 8-34 dealing with an arrested or reversed judgment, clearly refers to a final judgment on

the merits, and not to the tenuous ground put forth by the plaintiff that the Kentucky court made a tacit judgment on the Kentucky statute of limitations when it allowed plaintiff to use discovery methods to prepare his case on the merits.

Plaintiff contends that the equities are with him (which argument is appealing to this court) and that the only court open to him was the Kentucky court which retroactively closed its doors to him. The sympathy of this court is with the plaintiff, "but neither mere difficulty nor inconvenience in seeking a legal remedy . . ." will toll the statute of limitations. "The peace of society demands that there should be, at some time, an end put to litigation. . . . It is better that an individual should, in exceptional cases, suffer wrong, than a community should be kept in turmoil." *Johnson* v. *Merritt*, 125 Va. 162, 99 S.E. 785, 789 (1919). If the plaintiff has truly been done an injustice, his recourse is not in this court, but in appealing the decision of the Kentucky courts.

It is clear that under the law of Virginia, the plaintiff here has not met any of the four provisions of section 8-34, which suspend the running of the statute of limitations. When jurisdiction is based on diversity of citizenship, this court must follow the law of the state where it sits, and hereby finds that the Virginia statute of limitations bars plaintiff's suit.

For the reasons stated in this opinion and upon mature consideration of the facts relied upon by plaintiff in the case at bar, this court feels that the plaintiff's suit is barred by the Virginia statute of limitations.

Therefore, it is hereby ADJUDGED and ORDERED that defendant's motion for summary judgment be, and hereby is granted. A certified copy of this opinion and judgment is directed to be sent to counsel of record.

ENTER THIS ORDER:

/s/ TED DALTON
U. S. Chief District Judge
May 26, 1967

A TRUE COPY, TESTE:
LEIGH B. HANES, JR., *Clerk*

By: OLA F. HAYNES
Deputy Clerk